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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

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THE PEOPLE,

Plaintiff and Respondent,

v.

PHILLIP MYLES VIVIAN,

Defendant and Appellant.

C087684

(Super. Ct. No.  
STKCRFE20000006536)

In 2001, defendant Phillip Myles Vivian was found guilty of second degree murder and personal use of a firearm in the commission of the murder. The judgment was affirmed on appeal. Now in a subsequent appeal, he contends: 1) the trial court must clarify that he was sentenced to 15 years to life for second degree murder; and 2) remand is required to allow the trial court to exercise its discretion whether to strike the firearm enhancement. We agree that the abstract of judgment should be corrected to show that defendant was sentenced to serve 15 years to life for the second degree murder conviction. We reject defendant's claim that he is entitled to a resentencing hearing.

## FACTUAL AND PROCEDURAL BACKGROUND

Following a trial, the jury found defendant guilty of second degree murder and personal use of a firearm in the commission of the murder. (*People v. Vivian* (Apr. 19, 2002, C038211) [nonpub. opn.] (*Vivian I.*)) In this court’s opinion affirming the judgment on direct appeal, we noted that “[t]he trial court sentenced him to 15 years to life for the murder and a consecutive sentence of 25 years to life for the use of a firearm.” (*Ibid.*) However, the minute order states that defendant was sentenced to “life with possibility of parole” for the second degree murder and 25 years to life for the personal use of a firearm, noting that defendant would be eligible for parole after serving 40 years. The abstract of judgment reflects the same.

On April 5, 2018, the California Department of Corrections and Rehabilitation sent a letter to the trial court suggesting that the abstract of judgment and minute order may be “in error” because defendant was found guilty of murder and sentenced to life with the possibility of parole and asking the court to determine whether correction was required. Further, the letter further noted that under Penal Code<sup>1</sup> section 190, subdivision (a), every person found guilty of murder in the first degree shall be punished by either death, life without the possibility of parole, or a term of 25 years to life, and every person found guilty of murder in the second degree shall be punished by a term of 15 years to life.<sup>2</sup> In response, the trial court issued a minute order stating: “The 3rd District Court of

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<sup>1</sup> Further undesignated section references are to this code.

<sup>2</sup> In his opening brief, defendant purports that his counsel e-mailed the trial court, arguing that the sentence was either a clerical error or an illegal sentence, requiring resentencing. He further alleges that his counsel’s e-mail argued that if the matter required resentencing, the court should exercise its discretion to strike the section 12022.53 enhancement. Defendant filed a motion to augment the record on appeal with these purported e-mails; however, the court clerk filed a declaration that she was unable to locate these e-mails. Accordingly, the purported e-mails described in the appellate brief are not part of the record on appeal, and we will not consider this material.

Appeals [*sic*] decision describes the sentence. The conviction was for murder in the second degree, not in the first. Therefore, the terms are right, 15 to life for count 1 plus 25 to life for the enhancement.”

## DISCUSSION

### I

#### *Amended Abstract*

Defendant contends that the trial court must “clarify” his sentence for second degree murder. He argues that the trial court should be directed to recall his sentence and resentence him. The People concede that there is an error in the abstract of judgment but contend that rather than resentencing, the abstract of judgment must be corrected to state that defendant’s sentence for the second degree murder conviction is 15 years to life. We agree.

Section 190, subdivision (a), provides in pertinent part, “every person guilty of murder in the second degree shall be punished by imprisonment in the state prison for a term of 15 years to life.” While we do not have the benefit of the sentencing transcript before us, it is clear from both this court’s description of defendant’s sentence in our previous opinion and the trial court’s recent minute order that defendant was convicted of murder in the second degree and sentenced to a term of 15 years to life. (See *Vivian I*, *supra*, at p. 1.) This sentence is consistent with section 190, subdivision (a) whereas the sentence listed in the abstract of judgment, life with possibility of parole, is not consistent with any part of the statute. Accordingly, we conclude that the abstract of judgment contains a clerical error misstating the sentence that must be corrected. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 186-188 [appellate courts may order the trial court to correct clerical errors in the abstract of judgment].)

## II

### *Section 12022.53 Firearm Enhancement*

Defendant contends that his case must be remanded so the trial court can decide whether to strike the firearm enhancement under section 12022.53 pursuant to Senate Bill No. 620, amending former sections 12022.5 and 12022.53, effective January 1, 2018. (Stats. 2017, ch. 682, §§ 1-2.) We disagree.

First, defendant did not file an appropriate motion for resentencing. Second, the trial court did not issue an order denying his request for resentencing that we are able to review. While defendant asks us to review his counsel's e-mail communications with the trial court, these purported documents are not part of the record on appeal and do not constitute an appealable order under section 1237. Finally, we note that the trial court lacks jurisdiction to strike the enhancement because defendant's judgment is long final. (See *People v. Fuimaono* (2019) 32 Cal.App.5th 132, 135 [reasoning that the limited rule of retroactivity for the newly enacted Senate Bill No. 620 applies only to nonfinal judgments].) Accordingly, we reject his claim.

### DISPOSITION

The trial court is directed to prepare an amended abstract of judgment reflecting that the sentence for the conviction for murder in the second degree is 15 years to life in state prison. A certified copy of the amended abstract of judgment shall be forwarded to the Department of Corrections and Rehabilitation.

/s/  
Robie, J.

We concur:

/s/  
Blease, Acting P. J.

/s/  
Krause, J.